IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF OKLAHOMA

OKLAHOMA GAS AND ELECTRIC COMPANY, Plaintiff, vs. TOSHIBA INTERNATIONAL CORPORATION; REGENCO, LLC; NATIONAL ELECTRIC COIL COMPANY, L.P., Defendants.	)	CASE NO. CIV-14-759-HE

DEFENDANTS TOSHIBA INTERNATIONAL CORPORATION AND REGENCO, LLC'S, TRIAL BRIEF

Defendants, Toshiba International Corporation ("TIC") and ReGENco, LLC, ("ReGENco") respectfully submit the following Trial Brief which outlines the facts underlying the case, provides an overview of the findings that have already been made by the Court, presents the remaining evidentiary issues and expected testimony of Defendants' expert witnesses, and addresses the reaming legal issues before the Court. Accordingly, the Defendants show the Court as follows:

I. INTRODUCTION/FACTUAL BACKGROUND

This case involves a dispute over the refurbishment of an electric power generator at the OG&E generating plant in Muskogee, Oklahoma, in 2009 by ReGENco. At the time the work was performed, ReGENco was in the business of servicing and repairing electric generators. ReGENco later merged with TIC in 2012. The work performed by ReGENco consisted of a stator rewind and rotor rewind performed on a Westinghouse generator owned and operated by OG&E. ReGENco was awarded the contract in 2008 and the total contract price of the work performed by ReGENco was $5,790,000.00.

On December 26, 2012, the OG&E generator (known as "Muskogee 4") refurbished by ReGENco failed. OG&E alleges ReGENco's failure to perform the work in a good and workmanlike manner more than three years before was the proximate cause of the generator's failure. OG&E's Complaint [Doc. 1] has asserted causes of action against ReGENco for (1) breach of express warranty; (2) breach of implied warranty of fitness for a particular purpose; (3) and, breach of contract.[1]. OG&E also alleges TIC is liable for the alleged breaches of duty through the actions and/or omissions of ReGENco personnel via successor liability theory and is therefore liable to OG&E for any and all damages directly related to the work performed by ReGENco. OG&E further alleged a cause of action against co-Defendant, National Electric Coil, L.P. ("NEC"), for negligence related to its provision of materials used in the refurbishment performed by ReGENco. The Court's Order [Doc. 86] limits ReGENCo/Toshiba's liability for OG&E's damages to the contract amount of $5,879,000.

II. OVERVIEW OF LEGAL ISSUES ADDRESSED BY THE COURT

A. Dispositive Motions

The Court's Order [Doc. 86] further disposed of certain issues, including the contract terms pertaining to the limited liability of ReGENco/Toshiba. On February 26, 2016, Defendants filed their Motion for Partial Summary Judgment ("MSJ") [Doc. 73].

[1] Plaintiff's negligence claim was subsequently dismissed by the Court's Order of July 1, 2016 [Doc. 86], pursuant to the economic loss rule. *See*, Section II, *infra*.

Defendants' MSJ argued they were entitled to summary judgment on the following issues: (1) OG&E's warranty claim must fail because the contract between the parties contained a clause limiting their express warranty to one year from the date of acceptance and disclaimed all other warranties including all implied warranties; (2) OG&E's damages were limited by the terms of the contract which contained a clause limiting ReGENco's liability to the contract price; (3) OG&E assented to the terms limiting ReGENco's liability and disclaiming all warranties; (4) alternatively, Defendants were entitled to reformation of the agreement pursuant to a mistake of fact, and; (5) the economic loss rule barred OG&E from pursuing a negligence claim.

On March 18, 2016, OG&E filed its Cross-Motion for Partial Motion for Summary Judgment and Response to Toshiba International Corporation and ReGENco, LLC's Motion for Partial Summary Judgment ("OG&E's MSJ") [Doc. 76]. OG&E's MSJ argued that (1) under the Uniform Commercial Code ("UCC"), the terms of OG&E's Purchase Order comprised the contract between the parties; (2) in the alternative, the UCC excluded non-reciprocal terms when parties exchange conflicting forms; (3) Oklahoma's common law also determines that OG&E's Purchase Order constituted the contract between the parties; (4) regardless of the law applied, Defendants' Motion for Summary Judgment, with respect to OG&E warranty and liability limitation claims, must be denied; (5) the economic loss rule did not bar OG&E's negligence claim, and; (6) Defendants were not entitled to contract reformation.

On July 1, 2016, the Court issued its Order [Doc. 86], which ruled upon both motions for summary judgment. In its Order, the Court ruled that (1) the common law of contracts—not the UCC—applied to the contract; (2) OG&E accepted ReGENco's preferred terms, which limited ReGENco's liability to the contract price, disclaimed all implied warranties, and limited ReGENco's express warranty to one-year, repair and replacement only, and; (3) OG&E's negligence claim was barred by the economic loss rule. Consequently, Defendants' MSJ was granted as to those issues and OG&E's MSJ was denied as to the same. Given the Court's ruling and the expected trial evidence to come, Defendants anticipate a directed verdict regarding OG&E remaining warranty claims will become appropriate. *See*, Section IV, *infra*.

B. ***Daubert*** **Motions**

In addition to filing competing partial motions for summary judgment, the parties also filed *Daubert* motions regarding the proffered testimony of a number of expert witnesses. Specifically, Defendants filed *Daubert* challenges to the testimony of the following expert witnesses retained by OG&E: (1) generator engineer, Dr. Isidor Kerszenbaum, [Doc. 119], and; (2) metallurgist, Dr. Daniel Dennies [Doc. 123]. NEC also filed its Motion to Exclude Testimony by Plaintiff's Expert Witnesses, Isidor Kerszenbaum and Daniel Dennies [Doc. 117] and a Motion for Summary Judgment [Doc. 118], both of which challenged the admissibility of OG&E's expert witness testimony. OG&E filed *Daubert* motions [Docs. 120 & 121] seeking to limit or exclude entirely the testimony of the following expert witnesses for Defendants: (1) generator engineer Robert Fenton; (2) metallurgist Dr. Dale Alexander; (3) economist Charles Theriot, and; (4) NEC's generator expert, Robert Ward. Each expert, with the exception of Mr. Theriot who testified regarding OG&E's damages calculation, opined on the potential cause or potential causes of the generator's failure. All of the motions filed focused on the reliability of the given experts' testimony and characterized the same as speculative in nature.

On February 27, 2017, the Court issued an Order [Doc. 154] addressing parties' various motions seeking to limit or exclude expert testimony. The Court's Order did not disqualify any of the expert witnesses from testifying, but did limit some of their proffered testimony.

In regard to Dr. Kerszenbaum, the Court barred his testimony that the generator's failure was not due to the actions of OG&E's personnel "in any way" on the grounds that Dr. Kerszenbaum was not engaged to assess what its operators did or did not do. The Court also limited Mr. Ward's testimony regarding background facts and circumstances leading to the generator's refurbishment, as such testimony should be offered by fact witnesses. The Court rejected OG&E's challenge to Mr. Theriot's testimony, finding that Mr. Theriot was not required to provide what he believed to be the proper measure of OG&E's damages in order to critique OG&E's damages calculation, which Theriot characterizes as excessive. Subject to the limitations set forth by the Court, Defendants and OG&E's *Daubert* motions were otherwise denied. With respect to NEC's Motion in Limine, the Court struck that filing and concluded the arguments contained therein would be considered in connection with its Motion for Summary Judgment.

III. REMAINING EVIDENTIARY ISSUES AND EXPECTED TESTIMONY

Although the Court's rulings on the parties' dispositive motions and *Daubert* Motions have resolved and clarified a number of legal issues involved in the present case, several evidentiary issues remain unresolved. Those issues include the parties' prospective Motions in Limine. Pursuant to the Court's Revised Scheduling Order [Doc. 111], the Defendants are filing a Motion in Limine regarding the presumed testimony of several of OG&E's witnesses and the exhibits of Plaintiff OG&E.

A. Defendants' Motion in Limine

Defendants ReGENco and Toshiba refer the Court to their Motion in Limine for further discussion of these issues. However, to summarize, the Motion in Limine seeks to keep irrelevant and prejudicial testimony and the exhibits from regarding the following topics from reaching the jury: (1) references to ReGENco's prior rewind of a generator in Reno, Nevada known as "Valmy 2"; (2) references to "industry norms" regarding the expected lifespan of a rewound generator; and (3) references to alleged delays in installation somehow contributing to the generator's failure.

Defendants anticipate OG&E will attempt to admit testimony and exhibits regarding Defendants 2010 rewind work on the Valmy 2 generator. Such testimony and exhibits are irrelevant and unrelated to the failure of the Muskogee 4, the event which gave rise to the present case. Defendants further anticipate OG&E will seek to admit testimony and reference to the "industry norm" regarding the expected lifespan of a rewound generator. In his deposition testimony, OG&E's expert witness, Dr. Kerszenbaum, cited the fact that

Muskogee 4 failed within three and one half years of an expected 25 to 30-years anticipated lifespan as evidence of wrongdoing on the part of ReGENco. However, as the Court ruled, the contract between ReGENco and OG&E only contained a one-year repair and replace warranty and disclaimed all other implied warranties, including warranties of fitness for a purpose. Evidence of an expected life-span which contradicts the express language of the warranty provision in the parties' contract is in no way probative as to the cause of Muskogee 4's failure and cannot be used to argue ReGENco acted improperly in its rewind of the same. *See, E.g., Max Plaster Co. v. U.S. Fidelity and Guar. Co.*, 1996 OK 28, 912 P.2d 861.

Likewise, Defendants also move to exclude any testimony linking delays in design and installation of the end winding support system to Muskogee 4's failure. Defendants anticipate OG&E will reference such delays in support of its breach of contact theory. However, Plaintiff has offered no evidence, beyond merely conjecture, to support the theory that a compressed time table contributed to the quality of ReGENco's rewind. Plaintiff offers no evidence that such delay caused critical problems with the installation or design of the rewind. The argument is based solely upon conjecture.

B. Defendants' Expert Witness Testimony

Defendants will present the following expert witnesses: (1) generator engineer, Robert Fenton; (2) metallurgist, Dr. Dale Alexander, and; (3) economist Charles Theriot. Defendants expect Mr. Fenton will testify as to the potential cause and/or causes of

Muskogee 4's failure and OG&E's improper and unreasonable actions both pre-failure and post-failure which contribute to the damage to Muskogee 4.

Specifically, Fenton will testify that (1) prior trips may have contributed to Muskogee 4's failure by loosening the windings; (2) that unusual pre-failure temperature readings, which OG&E did not address, could have contributed to Muskogee 4's failure; (3) that excessive vibrations pre-failure could have contributed to the December, 2012, failure event; (4) that inaccurate generator timestamps were evidence of improper service and maintenance of Muskogee 4 by OG&E personnel, and; (5) that OG&E's multiple restarts of Muskogee 4 post-failure without performing proper diagnostic testing and evaluations of the generator's condition could have caused additional, unnecessary damage to the generator. Taken together, Fenton's testimony provides evidence of errors and omissions on the part of OG&E pre-failure and post-failure which could have contributed to failure and the damage to Muskogee 4. Fenton's testimony makes clear OG&E ignored several "red flags" prior to the failure and did nothing to address or correct the same. After the failure event, OG&E did not perform the proper evaluation of the generator's condition prior to restarting the generator three times, thereby reintroducing the fault into the generator and causing significant, additional damage. This additional damage may have caused the failure event to be more damaging and costly due to OG&E's failure to perform the necessary inspections prior to restarting the generator, not once, but three times. Fenton's testimony makes clear that there were a number of actions that OG&E could have taken which could have lessened or avoided the damage to Muskogee 4. OG&E chose to ignore a number of early warning signs regarding the generator's condition and improperly restarted the generator three times post-failure, leading to additional damage.

Similarly, Dr. Alexander will offer testimony which is damaging to OG&E's claims in this case. Dr. Alexander will testify (1) that excessive vibrations could have caused fractures in the windings, contributing to Muskogee 4's failure, and; (2) that ReGENco employed proper brazing techniques during the course of the rewind. Alexander's testimony regarding excessive pre-failure vibrations squares with those of Mr. Fenton. Alexander's testimony also refutes one of OG&Es' primary theories regarding the cause of Muskogee 4's failure. Specifically Alexander disputes that ReGENco improperly brazed the copper used to complete the rewind. Alexander's testimony casts doubt on OG&E's position that errors on the part of ReGENco contributed to Muskogee 4's failure.

Finally, Mr. Theriot will present testimony showing that OG&E's damages calculations are improper and excessive. Theriot's testimony focuses on OG&E's replacement of Muskogee 4's electrical generating capacity during the period when Muskogee 4 was repaired post-failure. According to Theriot, who performed a rigorous economic analysis of the documents supporting OG&E's claims for damages, OG&E could have used less costly means of replacing replace the capacity previous produced by Muskogee 4 by utilizing coal-fired generator, instead of a mix of fuels. These increased fuel costs were avoidable, but OG&E instead chose to utilize a far more costly method to replace Muskogee 4's capacity. Theriot will also testify that a significant portion of OG&E's alleged damages are not attributable to the failure itself, but rather those damages are in fact attributable to a number of "betterments" or improvements to the generator conducted post-failure. Theriot will testify this increased the time during which Muskogee 4 was out of service, thus inflating Plaintiff's extra generation expenses. Theriot's testimony undercuts OG&E's excessive claims for damages and makes clear that OG&E seeks compensation from Defendants for improvements to Muskogee 4 which are unrelated to its failure.

Taken together, the expert testimony proffered by Defendants serve to provide evidence that (1) OG&E's own poor maintenance and service of Muskogee 4 could have contributed to its failure; (2) OG&E's haste in restarting the generator increased damage to the same; (3) OG&E properly performed the brazing and the same did not contribute to Muskogee 4's failure; (4) OG&E failed to mitigate its damages by using a more costly method of replacing Muskogee 4's lost capacity, and; (5) a significant portion of OG&E's losses are attributable to "betterments, not the failure event itself. Defendants believe its expert testimony, which is provided by three highly-trained and experienced professions in their respective fields, will prove persuasive to the jury on the issues of liability and damages.

IV. REMAINING LEGAL ISSUES

As mentioned above, OG&E asserted causes of action against Defendants for (1) breach of contract; (2) breach of express warranty; (3) breach of the implied warranty of fitness for particular purpose, and; (4) negligence. OG&E's negligence claim was dismissed by the Court pursuant to the economic loss rule as applied by the Court in its

July 1, 2016, Order [Doc. 86]. The Court's Order is also fatal to OG&E's remaining warranty causes of action, and Defendants are entitled to a directed verdict in regard to the same. Under Oklahoma law, the standard for obtaining a directed verdict is as follows:

> The legal standard that governs motion for directed verdict and those for summary judgment is very similar, if not indeed identical. Neither may be sustained unless there is an entire absence of proof on a material issue. Both should be denied when there are questions or material fact or reasonable persons could differ as to the choice of inferences to be drawn from the facts in evidence. In determining whether a plaintiff's evidence is sufficient to withstand a motion for directed verdict, *the trial court must consider as true* all evidence favorable to the plaintiff together with all reasonable inferences to be drawn from it, and *disregard all conflicting evidence favorable to the movant.* Only if all the inferences to be drawn from the evidence are in favor of the moving party will a directed verdict withstand appellate scrutiny.

Harder v. F.C. Clinton, Inc., 1997 OK 137, ¶ 6, 948 P.2d 298, 302 (emphasis in original)

Even under this exacting standard, Defendants are entitled to a directed verdict in regard to OG&E's remaining causes of action. The Court's Order determined a number of issues regarding the nature of the contract between the parties. Among the issues decided on summary judgment were the terms of the contract between the parties. The Court determined that the following terms favored by ReGENco were part of the contract:

> The remedies of the Buyer set forth in these General Conditions are exclusive, and the sum total liability of Seller to Buyer with respect to the work, or anything done in connection therewith, such as performance or breach thereof, whether in contract, in tort (including negligence) or under any warranty or otherwise, shall not exceed the contract dollars.

And,

> This warranty is expressly in lieu of all other warranties, including but not limited to implied warranties of merchantability and fitness, and constitutes the only warranty of Seller with respect to the goods supplied by Seller.
>
> *See*, Order, p. 11.

The Court determined that both of the above clauses were part of the contract between the parties. Thus, the only warranty provided by ReGENco was a one-year repair and replace warranty:

> Unless otherwise provided in this agreement, the following warranty shall apply: If at any time prior to one (1) year from the date of receipt of goods at Buyer's facility, it appears that the goods, or any part thereof, do not conform to these warranties or specifications, and Buyer so notifies Seller within a reasonable time after its discovery, Seller shall promptly correct such nonconformity to the satisfaction of the Buyer at the Seller's sole expense; failing which, Buyer may proceed to make corrections or accomplish Seller's work by the most expeditious means available...Seller shall not be liable for consequential damages such as loss of profit, loss of use or production costs or capital.
>
> *See*, MSJ, p. 16.

Therefore, Defendants provided a one-year repair and replace warranty and disclaimed all other warranties, including all implied warranties, such as the implied warranty of fitness for a particular purpose. Given these contract limitations, OG&E cannot prevail on its claim for breach of express warranty.

According to OG&E's Complaint, the parties entered into a written contract on January 16, 2008. *See*, Complaint, [Doc. 1], ¶ 6. The delivery date for the Muskogee 4 was August 1, 2009. *Id.*, at ¶ 7. On January 6, 2010, ReGENco submitted its "Generator Rotor Final Report" summarizing the work performed. *Id.* Regardless of the date chosen, the express warranty provided by ReGENco expired at the latest on January 6,

2011. As OG&E's Complaint makes clear, Muskogee 4 failed on December 26, 2012. *Id.*, at ¶ 8. Therefore, according to OG&E's own admissions, Muskogee 4 failed *after* ReGENco's one-year repair and replace warranty expired. OG&E cannot recover for breach of express warranty when the warranty it seeks to enforce has expired. *See*, *Angel v. Goodman Mfg., Co., L.P.*, 617 F.Supp.2d 1120 (N.D.Okla. 2008) (holding that a plaintiff's express warranty clam is barred if the warranty expires before the defect arises). Defendant are entitled to a directed verdict in their favor regarding OG&E's breach of express warranty claim because, by OG&E's own admissions, the one-year express warranty provided by ReGENco was no longer in effect when Muskogee 4 failed on December 26, 2016.

Defendants are similarly entitled to a directed verdict on OG&E's claim for breach of warranty of fitness for a particular purpose. The Court's July 1, 2016, Order determined conclusively that ReGENco limited its warranty to one-year repair and replace and successfully disclaimed all other warranties, including implied warranties. The contract between the parties clearly states that ReGENco's one-year warranty was "expressly in lieu of all other warranties, including but not limited to implied warranties of merchantability and *fitness*." *See*, Order, p. 11 (emphasis added). Therefore, OG&E cannot recover for breach of the implied warranty of fitness for a particular purpose, as no such warranty exists or existed in regard to the work performed by ReGENco. Defendants properly disclaimed all implied warranties, including the warranty of fitness for a particular purpose. OG&E's cannot prevail on its claim for a breach of the same, as no warranty of fitness for a particular purpose was ever given by Defendants.

Accordingly, Defendants are entitled to a directed verdict on OG&E's claim for breach of warranty of fitness for a particular purpose.

Finally, as the Court's Order makes clear, any recovery had by OG&E in this case cannot exceed the contract price ($5,879,000) and OG&E is barred from recovering any damages attributable to "consequential damages such as loss of profit, loss of use or production costs or capital." OG&E has alleged damages in excess of $23,000,000.00, a sum which vastly exceeds the contract price. The Court's Order serves to bar OG&E from recovery of consequential damages, loss of use, and lost profits. The absolute maximum OG&E can recover pursuant to the contract is the contract price.

V. JURY INSTRUCTIONS

The jury instructions submitted by TIC and ReGENCO are by and large Oklahoma Uniform Jury Instructions. However, pursuant to the Court's Order [Doc. 86] limiting Plaintiff's damages against these defendants, an appropriate proposed jury instruction is submitted.

WHEREFORE, Defendants respectfully submit the foregoing Trial Brief and request that this Court enter a directed verdict in their favor regarding OG&E's remaining causes of action.

Respectfully submitted,

/s/ Michael D. Duncan
Michael D. Duncan, OBA No. 11601
Timothy F. Campbell, OBA No. 30513
CHUBBUCK DUNCAN & ROBEY
100 N. Broadway, Suite 2300
Oklahoma City, Oklahoma 73102
Telephone: 405-236-8282
Facsimile: 405-236-2828
mdduncan@chubbucklaw.com
tfcampbell@chubbucklaw.com
Attorney for Defendants, Toshiba & ReGENco, LLC

CERTIFICATE OF SERVICE

This is to certify that on the 15th day of March, 2017, I electronically transmitted the attached document to the Clerk of the Court using ECF System for filing. Based on the electronic records currently on file, the Clerk of the Court will transmit a Notice of Electronic Filing to the following recipients:

David Belczyk (*Pro Hac Vice*)
Roy A. Powell (*Pro Hac Vice*)
JONES DAY
500 Grant Street, Suite 4500
Pittsburgh, PA 15219
Telephone: 412-391-3939
Facsimile: 412-394-7959
dbelczyk@jonesday.com
Rapowell@jonesday.com
Attorneys for Plaintiff

Rodney L. Cook, Esq.
Fenton, Fenton, Smith, Reneau & Moon
211 N. Robinson, Suite 800
Oklahoma City, Oklahoma 73102
cookr@OGE.com
Attorney for Plaintiff

Robert E. Wilens, Esq.
Clausen Miller, P.C.
10 S. LaSalle Street, Suite 1600
Chicago, IL 60603-1098
rwilens@clausen.com
Attorney for Plaintiff

James L. Colvin, III, OBA No. 20654
James K. Secrest, II, OBA No. 8049
Secrest, Hill, Butler & Secrest
7134 South Yale Avenue, Suite 900
Tulsa, Oklahoma 74136
Telephone: 918-494-5905
Facsimile: 918-494-2847

jcolvin@secresthill.com
jsecrest@secresthill.com

Attorneys for National Electric Coil Company, L.P.

/s/ *Michael D. Duncan*